

STATE OF MICHIGAN
COURT OF APPEALS

JANIS R. MILLS,

Plaintiff-Appellant,

v

ST. JOHN HEALTH,

Defendant-Appellee.

UNPUBLISHED

June 4, 2015

No. 319282

Macomb Circuit Court

LC No. 2011-005486-CD

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I fully concur with the majority's conclusion that the circuit court properly granted summary disposition in favor of defendant with respect to plaintiffs' age-discrimination claim. I agree with the majority that plaintiffs failed to present sufficient evidence to create a triable question of fact on the issue of disparate-impact discrimination.

I also concur with the majority's conclusion that the circuit court properly dismissed plaintiffs' breach-of-contract claim. Plaintiffs failed to set forth sufficient evidence showing that defendant promised to pay them for their Long Term Bank hours. Moreover, plaintiffs failed to present sufficient evidence of an express contractual agreement allowing them to use the Long Term Bank hours. As the majority correctly observes, employee handbooks and other similar policies "will not create enforceable rights when the handbook expressly states that such provisions are not intended to create an employment contract." *Lytle v Malady*, 458 Mich 153, 170; 579 NW2d 906 (1998).

I respectfully dissent in part, however, with respect to the majority's analysis of plaintiffs' equitable claims. I believe that plaintiffs presented sufficient evidence to create a genuine issue of material fact concerning whether those employees who continue to work for defendant are entitled to *use* their Long Term Bank hours going forward under a theory of promissory estoppel.

While defendant never promised to pay plaintiffs for their accrued Long Term Bank hours, it cannot be seriously disputed that defendant promised plaintiffs that they could *use* their accrued Long Term Bank hours. After all, this was the entire purpose of including the Long Term Banks as a benefit of employment. I acknowledge that, at this time, no plaintiff has satisfied the prerequisites for using the Long Term Bank hours by exhausting the other accumulated leave time and short-term disability benefits. But this does not negate the facts that

(1) plaintiffs were promised a benefit (i.e., the *use* of the Long Term Bank hours), (2) plaintiffs reasonably relied on this promise by continuing to work for defendant, and (3) an injustice would result from terminating plaintiffs' ability to use the promised Long Term Bank hours going forward. See *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). Defendant made a "clear and definite," unequivocal promise to permit plaintiffs to use their Long Term Bank hours upon becoming eligible. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). And while the doctrine of promissory estoppel should be cautiously applied, *Marrero*, 200 Mich App at 442, there is simply no other way to avoid the injustice that would result from stripping the availability of the promised, accrued Long Term Bank hours from those plaintiffs who continue to work for defendant.

Viewed in a light most favorable to plaintiffs, the evidence was sufficient to establish that defendant promised to allow its employees to use their Long Term Bank hours, that plaintiffs relied on this promise by continuing to work for defendant, and that an injustice would result from cutting off plaintiffs' ability to use these promised hours upon becoming eligible. See *State Bank of Standish*, 442 Mich at 90-92. To the extent that those plaintiffs who continue to work for defendant seek to retain the ability to use their Long Term Bank hours in the future, I would allow their claim of promissory estoppel to go forward.

A rational jury could conclude that defendant made a clear and definite promise to allow its employees to use their accrued Long Term Bank hours and thereby induced plaintiffs' reasonable reliance. Indeed, by continuing to work for defendant, plaintiffs reasonably relied on this promise to their detriment. In all other respects, I concur with the majority.

/s/ Kathleen Jansen